

State of South Dakota

EIGHTY-SIXTH SESSION
LEGISLATIVE ASSEMBLY, 2011

400S0175

HOUSE BILL NO. 1012

Introduced by: The Committee on Health and Human Services at the request of the
Department of Human Services

1 FOR AN ACT ENTITLED, An Act to change the terminology for mental retard, mentally
2 retarded, mental retardation, and other similar terms in statute and to provide for the change
3 in printed materials and signage.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

5 Section 1. That § 10-62-1 be amended to read as follows:

6 10-62-1. Terms used in this chapter mean:

7 (1) "Department," the Department of Revenue and Regulation;

8 (2) "Intermediate care facility for ~~the mentally retarded~~ persons with intellectual
9 disabilities," a treatment or care center as defined by 1905(d) of the Social Security
10 Act and Code of Federal Regulations 42 CFR 435.1009 as of January 1, 2007;

11 (3) "Net revenues," the revenue paid to an intermediate care facility for ~~the mentally~~
12 ~~retarded~~ persons with intellectual disabilities for resident care, room, board, and
13 services less contractual adjustments and does not include revenue from sources
14 other than operations, including interest and guest meals.

15 Section 2. That § 10-62-2 be amended to read as follows:



10-62-2. There is hereby imposed a tax of five and one-half percent on the net revenues of each intermediate care facility for ~~the mentally retarded~~ persons with intellectual disabilities.

Section 3. That § 13-32-13 be amended to read as follows:

13-32-13. The provisions of §§ 13-32-10 to 13-32-12, inclusive, do not apply to any of the following group living environments:

- (1) A facility operated by the Department of Corrections;
- (2) A facility operated by the Department of Human Services;
- (3) A group care or residential treatment facility licensed by the Department of Social Services;
- (4) A residential treatment facility accredited by the Department of Human Services;
- (5) A community support provider as defined in § 27B-1-17;
- (6) An intermediate care facility for ~~the mentally retarded~~ persons with intellectual disabilities;
- (7) A juvenile detention center or holding facility operated by a county; or
- (8) A hospital or health care facility as defined in § 34-12-1.1.

Section 4. That subdivision (2) of § 22-46-1 be amended to read as follows:

- (2) "Disabled adult," a person eighteen years of age or older who suffers from a condition of ~~mental retardation~~ intellectual disability, infirmities of aging as manifested by organic brain damage, advanced age, or other physical dysfunctioning to the extent that the person is unable to protect himself or herself or provide for his or her own care;

Section 5. That § 23A-27A-26.1 be amended to read as follows:

23A-27A-26.1. Notwithstanding any other provision of law, the death penalty may not be imposed upon any person who ~~was mentally retarded~~ had an intellectual disability at the time

1 of the commission of the offense and whose ~~mental retardation~~ intellectual disability was
2 manifested and documented before the age of eighteen years.

3 Section 6. That § 23A-27A-26.2 be amended to read as follows:

4 23A-27A-26.2. As used in §§ 23A-27A-26.1 to 23A-27A-26.7, inclusive, ~~mental retardation~~
5 intellectual disability means significant subaverage general intellectual functioning existing
6 concurrently with substantial related deficits in applicable adaptive skill areas. An intelligence
7 quotient exceeding seventy on a reliable standardized measure of intelligence is presumptive
8 evidence that the defendant does not have significant subaverage general intellectual
9 functioning.

10 Section 7. That § 23A-27A-26.3 be amended to read as follows:

11 23A-27A-26.3. Not later than ninety days prior to the commencement of trial, the defendant
12 may upon a motion alleging reasonable cause to believe the defendant ~~was mentally retarded~~
13 had an intellectual disability at the time of the commission of the offense, apply for an order
14 directing that a ~~mental retardation~~ hearing be conducted prior to trial. If, upon review of the
15 defendant's motion and any response thereto, the court finds reasonable cause to believe the
16 defendant ~~was mentally retarded~~ had an intellectual disability, it shall promptly conduct a
17 hearing without a jury to determine whether the defendant ~~was mentally retarded~~ had an
18 intellectual disability. If the court finds after the hearing that the defendant ~~was not mentally~~
19 ~~retarded~~ did not have an intellectual disability at the time of the commission of the offense, the
20 court shall, prior to commencement of trial, enter an order so stating, but nothing in this
21 ~~paragraph~~ section precludes the defendant from presenting mitigating evidence of ~~mental~~
22 ~~retardation~~ an intellectual disability at the sentencing phase of the trial. If the court finds after
23 the hearing that the defendant established ~~mental retardation~~ an intellectual disability by a
24 preponderance of the evidence, the court shall prior to commencement of trial, enter an order

1 so stating. Unless the order is reversed on appeal, a separate sentencing proceeding under this
2 section may not be conducted if the defendant is thereafter convicted of murder in the first
3 degree. If a separate sentencing proceeding is not conducted, the court, upon conviction of a
4 defendant for the crime of murder in the first degree, shall sentence the defendant to life
5 imprisonment without parole.

6 Section 8. That § 23A-27A-26.4 be amended to read as follows:

7 23A-27A-26.4. If the court enters an order pursuant to § 23A-27A-26.3 finding that the
8 defendant ~~was mentally retarded~~ had an intellectual disability at the time of the commission of
9 the offense, the state may appeal as of right from the order. Upon entering such an order, the
10 court shall afford the state a reasonable period of time, which may not be less than ten days, to
11 determine whether to take an appeal from the order finding that the defendant ~~was mentally~~
12 ~~retarded~~ had an intellectual disability. The taking of an appeal by the state stays the effectiveness
13 of the court's order and any order fixing a date for trial.

14 Section 9. That § 23A-27A-26.5 be amended to read as follows:

15 23A-27A-26.5. If a defendant serves notice pursuant to § 23A-27A-26.3, the state may make
16 application, upon notice to the defendant, for an order directing that the defendant submit to an
17 examination by a psychiatrist, licensed psychologist, or licensed psychiatric social worker
18 designated by the state's attorney, for the purpose of rebutting evidence offered by the defendant.
19 Counsel for the state and the defendant have the right to be present at the examination. A
20 videotaped recording of the examination shall be made available to the defendant and the state's
21 attorney promptly after its conclusion. The state's attorney shall promptly serve on the defendant
22 a written copy of the findings and evaluation of the examiner. If a defendant is subjected to an
23 examination pursuant to an order issued in accordance with this section, any statement made by
24 the defendant for the purpose of the examination is inadmissible in evidence against the

1 defendant in any criminal action or proceeding on every issue other than that of whether the
2 defendant ~~was mentally retarded~~ had an intellectual disability at the time of the commission of
3 the offense, but ~~such~~ the statement is admissible upon such an issue whether or not it would
4 otherwise be deemed a privileged communication.

5 Section 10. That § 26-7A-85 be amended to read as follows:

6 26-7A-85. If it appears from the evidence presented at the adjudicatory hearing that the child
7 may be mentally ill or ~~mentally retarded~~ has an intellectual disability, as the terms are defined
8 in Title 27A or Title 27B, the court may suspend the adjudicatory hearing and may:

- 9 (1) Order that the child be examined by a qualified mental health professional. The court
10 may place the child in a hospital or other suitable facility for the purposes of the
11 examination; or
12 (2) Recommend to the state that the proceedings be conducted as provided in applicable
13 chapters of Title 27A or Title 27B.

14 Even if the court exercises some of the authority in this section, the court may proceed with
15 the adjudicatory hearing and dispositional hearing.

16 Section 11. That subdivision (18) of § 27A-1-1 be amended to read as follows:

- 17 (18) "Severe mental illness," substantial organic or psychiatric disorder of thought, mood,
18 perception, orientation, or memory which significantly impairs judgment, behavior,
19 or ability to cope with the basic demands of life. ~~Mental retardation~~ Intellectual
20 disability, epilepsy, other developmental disability, alcohol or substance abuse, or
21 brief periods of intoxication, or criminal behavior do not, alone, constitute severe
22 mental illness.

23 Section 12. That § 27A-15-1.1 be amended to read as follows:

24 27A-15-1.1. For the purposes of this chapter, an individual with a serious emotional

disturbance is an individual who:

- (1) Is under eighteen years of age;
- (2) Exhibits behavior resulting in functional impairment which substantially interferes with, or limits the individual's role or functioning in the community, school, family, or peer group;
- (3) Has a mental disorder diagnosed under the Diagnostic and Statistical Manual of Mental Disorders, fourth edition revised, 1994;
- (4) Has demonstrated a need for one or more special care services, in addition to mental health; and
- (5) Has problems with a demonstrated or expected longevity of at least one year or has an impairment of short duration and high severity.

For purposes of this section, ~~mental retardation~~ intellectual disability, epilepsy, other developmental disability, alcohol or substance abuse, brief period of intoxication, or criminal or delinquent behavior do not, alone, constitute serious emotional disturbance.

Section 13. That subdivision (14) of § 27B-1-17 be amended to read as follows:

- (14) "Qualified ~~mental retardation~~ developmental disabilities professional," any person with at least one year of experience working directly with ~~mental retardation~~ persons with intellectual disabilities or other developmental disabilities and is either a doctor of medicine or osteopathy, a registered nurse, or a person who holds at least a bachelor's degree in a professional category.

Section 14. That § 27B-7-30 be amended to read as follows:

27B-7-30. If requested, information shall be disclosed:

- (1) Pursuant to orders or subpoenas of a court of record or subpoenas of the Legislature or chair of the county review board;

- 1 (2) To a prosecuting or defense attorney or to a qualified ~~mental-retardation~~
2 developmental disabilities professional as necessary for participation in a proceeding
3 governed by this title;
- 4 (3) To an attorney representing a person who is presently subject to the authority of this
5 title or who has been discharged if that person has given consent;
- 6 (4) If necessary in order to comply with another provision of law;
- 7 (5) To the Department of Human Services if the information is necessary to enable the
8 Department of Human Services to discharge a responsibility placed upon it by law;
9 or
- 10 (6) To a state's attorney or the attorney general for the purpose of investigation of an
11 alleged criminal act either committed by or upon a person with a developmental
12 disability.

13 Section 15. That § 27B-7-38 be amended to read as follows:

14 27B-7-38. The county review board may issue a detention order and direct a law
15 enforcement officer from the referring county or the county of residence to immediately take the
16 person to a community service provider or facility recommended by the Department of Human
17 Services, with the approval of the provider, to be detained for purposes of an examination if the
18 county review board finds from the petition, from other statements under oath, or from reports
19 of physicians, psychiatrists, psychologists, or other qualified ~~mental-retardation~~ developmental
20 disabilities professionals that there is reasonable basis to believe that the person to be committed
21 poses an immediate danger of physical injury to self or others.

22 If the county review board issues a detention order based on a petition that did not include
23 a recommendation for detention by a psychiatrist or psychologist, the person shall be examined
24 by a psychiatrist or psychologist within forty-eight hours of the issuance of the detention order,

1 excluding Saturdays, Sundays, and legal holidays. The results shall be reported to the county
2 review board. If the report is not received by the county review board within forty-eight hours,
3 excluding Saturdays, Sundays, and legal holidays, the person shall be released from placement
4 with the community service provider. The report shall include:

- 5 (1) Whether the person may be diagnosed as having a developmental disability;
- 6 (2) Whether supports and services are available and appropriate in lieu of county review
7 board proceedings; and
- 8 (3) Whether the person continues to pose an immediate danger of physical injury to self
9 or others due to the developmental disability.

10 Upon receipt of the report by the county review board, if it is determined that the person
11 continues to pose an immediate danger of physical injury to self or others due to the
12 developmental disability, placement with a community service provider shall continue while the
13 commitment process is pending. If the person does not continue to pose an immediate danger
14 of physical injury to self or others, the person shall be released from placement with the
15 community service provider pending further proceedings. No record of arrest may be charged
16 against the person.

17 Section 16. That § 27B-8-41 be amended to read as follows:

18 27B-8-41. No person with a developmental disability is subject to any experimental research
19 or hazardous treatment procedures without the consent of:

- 20 (1) The person with a developmental disability, if eighteen years of age or over and
21 capable of giving informed consent. If any person's capacity to give informed consent
22 is challenged, the person, a qualified ~~mental-retardation~~ developmental disabilities
23 professional, physician, or interested person may file a petition with the court to
24 determine competency to give consent;

(2) The guardian of the person with a developmental disability, if the guardian is legally empowered to execute such consent; or

(3) The parent or guardian of the person with a developmental disability, if the person with a developmental disability is less than eighteen years of age.

No person with a developmental disability who is subject to an order of guardianship may be subjected to experimental research or hazardous treatment procedures without prior authorization of the circuit court.

Section 17. That § 28-6-23 be amended to read as follows:

28-6-23. Any payment of medical assistance by or through the Department of Social Services to an individual who is an inpatient in a nursing facility, an intermediate care facility for ~~the mentally retarded~~ persons with intellectual disabilities, or other medical institution, is a debt due to the department. Any payment on behalf of any person fifty-five years of age or older for nursing facility services, home and community based services, intermediate care facility services for ~~the mentally retarded~~ persons with intellectual disabilities, hospital and prescription drug services, is a debt due the department. The Department of Social Services shall establish a system of recovery of medical assistance correctly paid by or through the department. The Department of Social Services may file a claim against the estate of the surviving spouse of a medical assistance recipient to satisfy the debt established under this section. The secretary of social services shall adopt rules, pursuant to chapter 1-26, to define the scope of recoveries, establish hardship limitations on recoveries, establish limits on recoveries, and provide rules required to obtain federal financial participation in the medical assistance program.

For the purposes of this section, a surviving spouse is a person who was married to the deceased medical assistance recipient when the recipient became eligible for medical assistance, who has not divorced the medical assistance recipient, and who has not remarried after the

recipient's death.

Section 18. That § 28-6-24 be amended to read as follows:

28-6-24. Any payment of medical assistance by or through the Department of Social Services to an individual who is an inpatient in a nursing facility, an intermediate care facility for ~~the mentally retarded~~ persons with intellectual disabilities, or other medical institution is a debt and creates a medical assistance lien against any real property in which the individual has any ownership interest. The secretary of social services shall adopt reasonable and necessary rules, pursuant to chapter 1-26, to define such individuals, establish the amount of the lien, establish limitations on the lien as required by federal law or regulations, and provide any other rules as may be required to obtain federal financial participation in the medical assistance program. The lien so created shall be perfected against real estate as provided in § 28-6-25.

Section 19. That § 28-6-25 be amended to read as follows:

28-6-25. The Department of Social Services shall file a medical assistance real estate lien with the register of deeds in any county where the individual has an ownership interest in real property. The lien statement filed shall contain, at a minimum, the following information:

- (1) The name and last known address of all owners of the real property;
- (2) The legal description of the real estate to which the lien is to attach;
- (3) The circumstances out of which the lien is claimed to have arisen and the circumstances, if any, under which future accumulations may arise;
- (4) The amount claimed as a lien and the probable amounts by which it may increase, if known.

The register of deeds shall, without charge to the department, record the medical assistance real estate lien in the real estate records, at which time the lien will attach to the real property interest of the recipient described in subdivision (2) of this section. The lien shall remain in

1 effect for a period of twenty years from the time of recording in the county where the land is
2 located as provided in this section, unless released or foreclosed as provided by law.

3 If the individual is discharged or released from a nursing facility, intermediate care facility
4 ~~for the mentally retarded persons with intellectual disabilities~~, or other medical institution, other
5 than by death or transfer to another or similar institution, the Department of Social Services
6 shall immediately, upon notice of the discharge or release, file with the register of deeds a
7 satisfaction of the lien which shall be recorded by the register of deeds in the real estate records
8 without charge.

9 Section 20. That § 28-13-23 be amended to read as follows:

10 28-13-23. The board of county commissioners may in its discretion allow and pay to poor
11 persons who may become county charges and who are of mature years and sound mind, and who
12 from their general character will probably be benefited thereby, and also to the parents of
13 ~~mentally retarded~~ children with intellectual disabilities and children otherwise helpless and
14 requiring the attention of their parents, and who are unable to provide for such children
15 themselves, such annual allowance as will not exceed the charge of their maintenance in the
16 ordinary mode, such board taking the usual amount of charges in like cases as the rule for
17 making such allowance.

18 Section 21. That § 34-1-19 be amended to read as follows:

19 34-1-19. The ~~State~~ Department of Health shall cooperate with and make available its
20 services to the ~~State~~ Department of Social Services, including the administrator of the South
21 Dakota Developmental Center--Redfield, for the purpose of advancing the health and well-being
22 of ~~the mentally retarded~~ persons with intellectual disabilities placed under the control of the
23 department, whether institutionalized or not.

24 Section 22. That § 34-24-16 be amended to read as follows:

1 34-24-16. The ~~State~~ Department of Health shall provide for the development and carrying
2 out of an educational program among physicians, staffs of hospitals, public health nurses, and
3 the citizens of this state concerning the disease phenylketonuria, hypothyroidism, and other
4 metabolic diseases which may cause ~~mental retardation~~ intellectual disabilities for which
5 appropriate methods of detection, prevention, or treatment are available. This educational
6 program shall include information about the nature of the diseases and examinations for the
7 early detection of such diseases in order that proper measures may be taken to prevent ~~mental~~
8 ~~retardation~~ intellectual disabilities.

9 Section 23. That § 58-17-30.1 be amended to read as follows:

10 58-17-30.1. An individual health insurance policy, which is delivered or issued for delivery
11 in this state and which provides that coverage of a dependent child ~~shall terminate~~ terminates
12 upon attainment of the limiting age for dependent children specified in the policy, shall also
13 provide that attainment of such limiting age ~~shall~~ does not operate to terminate the coverage of
14 ~~such~~ the child while the child is and continues to be both (a) incapable of self-sustaining
15 employment by reason of ~~mental retardation~~ intellectual disability or physical ~~handicap~~
16 disability and (b) chiefly dependent upon the policyholder for support and maintenance,
17 ~~provided if~~ proof of ~~such~~ the incapacity and dependency is furnished to the insurer by the
18 policyholder within thirty-one days of the child's attainment of the limiting age and subsequently
19 as may be required by the insurer but not more frequently than annually after the two-year period
20 following the child's attainment of the limiting age.

21 Section 24. That § 58-18-31 be amended to read as follows:

22 58-18-31. A group or blanket health insurance policy, which is delivered or issued for
23 delivery in this state and which provides that coverage of a dependent child ~~shall terminate~~
24 terminates upon attainment of the limiting age for dependent children specified in the policy,

1 shall also provide that attainment of such limiting age ~~shall~~ does not operate to terminate the
2 coverage of such child while the child is and continues to be both ~~(a)~~ incapable of
3 self-sustaining employment by reason of ~~mental retardation~~ intellectual disability or physical
4 ~~handicap~~ disability and ~~(b)~~ chiefly dependent upon the policyholder for support and
5 maintenance, ~~provided if~~ proof of ~~such~~ the incapacity and dependency is furnished to the insurer
6 by the policyholder within thirty-one days of the child's attainment of the limiting age and
7 subsequently as may be required by the insurer but not more frequently than annually after the
8 two-year period following the child's attainment of the limiting age.

9 Section 25. Each state agency shall change references to "mental retard," "mentally
10 retarded," and "mental retardation," to "persons with an intellectual disability," "intellectually
11 disabled," or "intellectual disability," whenever printed material or signage is replaced or new
12 printed material or signage is obtained. A state agency does not have to replace existing printed
13 material or signage to comply with this section.